STRAITS SETTLEMENTS REPORTS.

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[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

June 30, 1939.

[CIVIL APPELLATE JURISDICTION]

McELWAINE, C.J. (S.S.), POYSER, C.J. (F.M.S.) AND GORDON-SMITH, Ag. J.A.

August 30, 1939.

IN RE PHUAH HIN LEONG (DECEASED) and IN RE ONG TENG NEOH (DECEASED).

(PENANG CIVIL APPEAL No. 2 of 1939)

Estate Duty Ordinance (Cap. 227), S. 36—Limit of time for appealing against assessment of estate duty.

A lady was entitled to two distinct interests under the Will of a testator, namely, an annuity and a share of income of residuary estate. The lady, hereinafter referred to as the deceased, died in February 1932. The trustees of the estate of the testator being accountable parties rendered an account to the Commissioner of Estate Duties. The Commissioner of Estate Duties carried out his statutory duties under Section 31 of the Estate Duty Ordinance and certified what was payable on account of estate duty on the back of the Petitioners' account. This certificate was signed and certified on the 4th January 1939. On 13th February 1933 the trustees deposited a substantial sum towards the estate duty in order to escape being charged with interest. On the same day the Commissioners wrote to the trustees' solicitor informing him of the amount of duty which he had certified as being payable. This letter was posted on the 6th January 1939 and undoubtedly reached the trustees' solicitor. On 21st January 1939 the trustees' solicitor wrote to the Commissioner of Estate Duties claiming exemption from estate duty in respect of one of the two distinct interests which the deceased took under the testator's Will, namely, the share of income of the residuary estate. On 23rd February 1939 the Commissioner of Estate Duties replied rejecting this claim for exemption. Further correspondence ensued in which the Commissioner continued to reject the claim for exemption. On 22nd May 1939 the trustees' solicitor lodged a Petition of Appeal and paid the estate duty claimed under protest and they made a formal claim for refund.

Held, that, under Section 36 (1) of the Estate Duty Ordinance the time limit for appeal against the certificate of the Commissioner is three months from the date of the certificate (i.e. 4th January 1939). Section 34 of the Ordinance cannot be read together with Section 36 (1) to permit of an appeal being entertained after the said time limit of three months.

B. E. Ross and *Ong Huck Lim* for Appellants.

R. Moor (Crown Counsel) for Commissioner of Estate Duties, Respondent.

ORIGINATING PETITION.

Aitken, J.—I do not know when the above-named Testator, Phuah Hin Leong, made his last Will and Testament and the Codicils thereto, or when he died, or when such last Will and Testament and Codicils were admitted to probate, but it is common ground that all these events have occurred. It is also common ground that when the testator died his first wife, named Ong Teng Neoh, became entitled under his Will (a) to an annuity of $150.00 a month, and (b) to a share in the income derived from his residuary estate, which interests continued until her death on the 18th of February 1932.

On the 13th of February, 1933, the trustees of the above-named testator's Will, acting under Section 26 (2) of the Estate Duty Ordinance, deposited $5,000.00 with the Commissioner of Estate Duties as security for the payment of the estate duty which had become payable as a result of the termination of Ong Teng Neoh's interests in the testator's estate.

Nothing further seems to have been done in the matter of that estate duty until the 13th of December, 1938, when the present trustees of the testator's Will delivered to the Commissioner an account of the property passing on the death of Ong Teng Neoh, and admitted that they were accountable for the estate duty which had thus become payable. This account was apparently delivered in response to a demand or request on the part of the Commissioner, and Section 27 (4) of the Estate Duty Ordinance refers thereto. In the account itself, which is verified by affirmation, the present trustees value Ong Teng Neoh's annuity of $150.00 a month at $24,158.29, and her share in the income of the testator's residuary estate at $61,439.12: a total value of $85,597.41. In para. 4 thereof, the present trustees say "we desire to pay estate duty on the property comprised in this account being accountable therefor".

On the back of this account, the Commissioner of Estate Duties endorsed the following certificate:—

"Account of Estate Duty payable:—

Estate Duty at 8% on $85,597.41 ..	$6,847.79
Interest at 6% on $6,847.79 from 18-2-32 to 13-2-33	406.35
Interest on $2,254.14 at 6% from 14-2-33 to 12-1-39	655.48
	$7,909.62

Certified correct,

Sd. S. ANGUS,

for Commissioner of Estate Duties, S.S. 4-1-39."

In doing so the Commissioner was obviously acting under and in accordance with Section 30 (1) of the Ordinance, and on the same 4th of January, 1939, he wrote to Mr. Ong Huck Lim, who has been acting for the present trustees of the testator's Will, as follows:—

> "With reference to the estate duty account filed herein, I have the honour to inform you that duty payable herein is as follows:—
>
> | | |
> |---|---|
> | Duty on $85,597.41 at 8% .. | $6,847.79 |
> | Interest on $6,847.79 at 6% p.a. from 18.2.32 to 13.2.33 .. .. | 406.35 |
> | | $7,254.14 |
> | Less amount deposited on 13.2.33 .. | 5,000.00 |
> | | $2,254.14 |
> | Interest on $2,254.14 at 6% p.a. from 14.2.33 to 12.1.39 .. .. | 655.48 |
> | | $2,909.62 |
>
> plus further interest until payment."

This letter was posted to Mr. Ong Huck Lim on the 6th of January, 1939, and must be presumed to have reached him on the 7th of that month in due course of post. It certainly did reach him on some date early in January, 1939, and the reference therein to the estate duty account which had been delivered to the Commissioner by Ong Huck Lim's clients appears to me to be sufficient to have given him and them, notice that the Commissioner had "ascertained" the amount of estate duty payable as the result of the death of Ong Teng Neoh within the meaning of that expression as used in Section 30(1) of the Ordinance.

On the 21st of January, 1939, Mr. Ong Huck Lim wrote to the Commissioner, apparently in reply to the latter's letter of the 4th of that month, claiming exemption from the payment of estate duty in respect of Ong Teng Neoh's share in the income derived from the testator's residuary estate. He based this claim for exemption on Section 13 of the Ordinance.

To this letter, the Commissioner replied on the 23rd of February, 1939, stating that he did not agree that the property declared in the account was exempt from estate duty under section 13 of the Ordinance, as the late Ong Teng Neoh's interest under the testator's will were not specifically charged on any definite part of the testator's estate, and therefore there was no "settled property" within the meaning of that section.

On the 6th of March, 1939, Mr. Ong Huck Lim again put forward the claim for exemption from estate duty in respect of Ong Teng Neoh's share in the income derived from the testator's residuary estate, but without adducing any new arguments in support thereof. Omitting the purely formal parts, his letter of that date reads as follows:—

> "I have the honour to acknowledge receipt of your letter of the 23rd ultimo.
>
> I am instructed by my clients to agree that as regards the annuity duty is payable on the grounds that it is not specifically charged on any definite part of the estate. My clients maintain, however, that the widow's other interest is exempted from duty.
>
> Please let me hear from you further."

To this letter the Commissioner replied on the 8th of March, 1939, in these terms:—

> "I have the honour to acknowledge receipt of your letter dated 6th March, 1939. I note that your clients agree that duty is payable on the widow's annuity.
>
> With regard to the interest declared in para. 2 (b) of the Account, I would refer you to the definitions of settlement and settled property in Section 2 of the Ordinance. If your clients contend that any definite property, which can be precisely defined, stands limited for the payment of the widow's interest of 1/9 of 15/17 of the income from the residuary estate, I should be glad to know what that property is."

To interrupt my narrative of events by a brief digression, it seems to me that when Mr. Ong Huck Lim and his clients received this letter of the 8th of March, 1939, from the Commissioner, they ought to have made up their minds then and there, so to speak, whether they were going to apply to the High Court under Section 36 (1) of the Ordinance to determine the amount of the estate duty payable by reason of Ong Teng Neoh's death. It was, or should have been, clear enough to them that the Commissioner had come to a decision as to the amount of estate duty payable on the Account which they had delivered to him, and that he was showing no disposition to modify that decision. Mr. Ong Huck Lim must also have been well aware of the terms and provisions of Section 30(1) and Section 36(1) of the Ordinance, and must have realised that, in view of those terms and provisions, any considerable delay in filing the appropriate application was fraught with grave danger.

If the Commissioner had carried out the duty imposed on him by section 30(1) of the Ordinance —and it was only reasonable to assume that he had done so—then the terms and provisions of Section 36(1) surely indicate that the time within which such an application could be filed almost certainly expired on the 4th of April, 1939.

To resume my narrative of events, Mr. Ong Huck Lim sent no reply to this letter of the 8th of March, 1939, and no further correspondence seems to have taken place in the matter until the Commissioner

wrote another letter to Mr. Ong Huck Lim on the 3rd of May, 1939. The contents of that letter have not been disclosed, but there can be little doubt that it contained a request for payment of estate duty in accordance with the Commissioner's views on the subject.

On the 9th of May, 1939, Mr. Ong Huck Lim wrote to the Commissioner as follows:—

> "I have the honour to acknowledge receipt of your letter of the 3rd instant.
>
> As indicated in my previous correspondence, my clients claim exemption in respect of the deceased's 1/9 share under clause 17 (a) of the Will.
>
> It will appear, therefore, that there is a refund payable by your office in respect of the deposit of the $5,000.00 deposited with you on 13th February, 1933."

To this letter, the Commissioner replied on the 11th of May, 1939, in terms which can have left no doubt in any one's mind as to his views on the position. He wrote:—

> "I have the honour to acknowledge receipt of your letter dated 9th May, 1939.
>
> 2. I would refer you to my letters dated 23rd February and 8th March, 1939, in which I have already informed you that deceased's interest in the estate of Phuah Hin Leong deceased is not exempt from duty. Will you please instruct your clients to let me have early payment of the duty assessed herein."

The last letter in this correspondence is dated the 22nd of May 1939 and written by Mr. Ong Huck Lim to the Commissioner. It reads as follows:—

> "I have the honour to send you herewith under protest a cheque for $2,958.46 ($2,909.62 plus $48.84) to cover duty and further interest as set out in your letter of the 4th January last.
>
> I am instructed to formally claim refund in respect of that part of duty assessed on the life interest of the abovenamed Ong Teng Neoh (deceased) under Clause 17 (a) of the Will.
>
> As indicated in my letter of the 16th instant, I am to-day, filing a Petition in the High Court."

On the same date, that is, the 22nd day of May, 1939, Mr. Ong Huck Lim filed this Originating Petition, and so fulfilled the prophetic warning with which he had closed his correspondence with the Commissioner.

On the 30th of May, 1939, Mr. Moor, the Crown Counsel at Penang, entered a conditional appearance to this Petition on behalf of the Commissioner; and on the 3rd of June, 1939, he sued out a Summons in Chambers on behalf of the Commissioner praying that this Petition be "struck out" on the ground that "the same was not lodged in this Honourable Court within three months of the 4th January, 1939 (being the date of the certificate of the Commissioner of Estate Duties, under Section 30(1) of the Estate Duty Ordinance) as required by Section 36(1) of the said Ordinance".

This Summons in Chambers was adjourned into Court, where I heard the able arguments presented to me by Mr. Moor and Mr. Ong Huck Lim on the 10th of June, 1939. The short Judgment which I wrote and delivered on the same date at the conclusion of those arguments reads as follows:—

> "I am clearly of opinion that the only appeal which the petitioners could have brought in the circumstances of this case was an appeal against the Commissioner's certificate of the 4th of January 1939. They have omitted to lodge their petition of appeal within the limit of three months from that date, which is the time limit provided by the Legislature, and it must therefore be dismissed with costs."

There is little that I can usefully add those few words. However much one may seek to disguise the substance of the transaction in question by claims for a refund, it is the decision of the Commissioner as to the amount of estate duty payable with which the petitioners are aggrieved. And that decision is embodied in the certificate which he endorsed on the 4th of January, 1939, on the Account which the Petitioners themselves affirmed on the 13th of December, 1938. In doing so the Commissioner was acting under and in accordance with Section 30(1) of the Ordinance, and Section 36(1) of the Ordinance provides (inter alia) that "an accountable person"—and the present trustees of the testator's will are admittedly accountable persons—"aggrieved by the certificate of the Commissioner under Section 30(1) may apply to the High Court within three months from the date of the certificate, and the amount of the duty and interest shall be determined by the High Court". As the petitioners failed to apply within that period of time, I felt compelled to dismiss their petition.

Mr. Ong Huck Lim, in his argument before me, relied on section 34 of the Ordinance, and contended that the Petitioners' grievance was with the Commissioner's refusal to make the refund claimed in the last sentence of his letter of the 22nd of May, 1939, which I have already quoted in full.

This contention seemed to me to be confounding the shadow with the substance, and the fancies of rhetoric with the plain facts of the situation. In my opinion Section 34 of the Ordinance has nothing whatever to do with these plain facts, and if, contrary to my belief, Mr. Ong Huck Lim's argument is really sound, then the Commissioner's decisions on all questions of estate duty can be brought before the High

Court at almost any period of time after they have been given, by the simple device of demanding a refund from him and then applying to the Court within three months of his refusal to make one.

The Trustees appealed against the above Judgment.

B. E. Ross and *Ong Huck Lim* for the Appellants.

R. Moor (Crown Counsel) for the Commissioner of Estate Duties.

Poyser, C. J.—The appellants are the trustees of the Will of the late Phuah Hin Leong, and they appeal against a judgment of Aitken J. dismissing a petition by them for the refund of estate duty they paid under protest. The following are the material facts.

The Commissioner of Estate Duties (Straits Settlements) on the 4th of January 1939 certified, under section 30(1) of the Estate Duty Ordinance, that the balance of estate duty payable was $2,909.62. On the 21st January the trustees' solicitor claimed exemption from estate duty in respect of Ong Teng Neoh's (a widow of the deceased) share in the income from the residuary estate. The Commissioner on the 8th of March rejected this claim on the ground that no definite property was limited for this widow's interest; and the trustees paid, on the 22nd of May, the amount claimed by the Commissioner, but on the same day filed a petition in the Supreme Court claiming exemption from estate duty in respect of the above widow's life interest.

The petition was dismissed by Aitken J., and I have not the slightest doubt that he came to a correct conclusion; and for the purpose of this appeal it is only necessary to state that I entirely agree with the following passage in his judgment.

> "I am clearly of opinion that the only appeal which the petitioners could have brought in the circumstances of this case was an appeal against the Commissioner's certificate of the 4th of January 1939. They have omitted to lodge their petition of appeal within the limit of three months from that date, which is the time limit provided by the legislature, and it must therefore be dismissed with costs."

It was argued both before Aitken J. and ourselves that section 34 of the Ordinance read together with section 36(1) permitted of this claim being entertained, but as Aitken J. points out. section 34, which deals with the value of property, has no application to this case. The petitioners' grievance was the Commissioner's certificate in regard to the amount of estate duty payable, not in regard to the value of the estate, and that being the case the application to the High Court should have been made within three months from the date of the certificate, and as this was not done, the petition was rightly dismissed.

I would dismiss the appeal with costs.

McElwaine, C.J. (S.S.)—I concur.

Gordon Smith, Ag. J.A.—I concur.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

PEDLOW, J.

August 25, 1939.

RASU v. REX.

[MALACCA CRIMINAL APPEAL No. 15 of 1939]

Criminal procedure—onus of proof.

A Magistrate must not convict an accused merely because he does not believe the story of the defence. Whether he does or does not believe the defence he must be satisfied of the truth of the prosecution's story.

CRIMINAL APPEAL.

Salt for Appellant.

Griffith Jones (Crown Counsel) for the Crown.

The facts and arguments appear sufficiently from the judgment.

Pedlow, J.—delivered a written judgment in which the following occurs:—

The fact that the learned Magistrate called on the accused for his defence shows that he considered a *prima facie* case against him had been made out. He acquitted three of the accused and he called on this accused for his defence. I think in this case he was justified in all the circumstances of the case.

A complaint had been lodged at the police station that the present complainant had assaulted someone else and the police on coming to make inquiries found that the present complainant was himself injured, and he alleged that No. 1 accused had hit him.

There had obviously been a fight of some kind, and the complainant's witness, Suppiah, corroborated the complainant's story that the accused had assaulted him.

The accused denied the assault and told a story which the learned Magistrate did not believe. I can but infer that he did not believe the accused when he said that he did not assault the complainant.

I propose to confirm the conviction.

On the question of sentence, I propose to alter it to one of being bound over in the sum of $50/- for